of the Missouri River Sys. Litig., 277 F. Supp. 2d 1378, 1379 (2003). The federal defendants subsequently moved for dismissal of petitioners' complaint in the instant case.

The Minnesota district court granted the motion to dismiss. Pet. App. 10-20. At the outset, the court noted that waivers of sovereign immunity must be strictly construed. *Id.* at 14. The court suggested that it was "possible," if not certain, that Section 1323(a) was applicable to discharges from reservoirs, insofar as the Corps had "jurisdiction" over Lake Sakakawea. *Id.* at 15-16. The court reasoned, however, that, "even if § 1323(a) constituted a waiver of sovereign immunity in this particular case, it would not be a complete waiver of sovereign immunity." *Id.* at 16. The court recognized that Section 1371(a) "provides sovereign immunity for the Corps when compliance with [state] water quality standards might affect or impair the authority of the Corps to maintain navigation." *Ibid.* The court then noted that, under the Flood Control Act, the Corps was required to manage the waters of the Missouri River Basin in such a way as to both control flooding and maintain navigation. *Id.* at 16-17. The court reasoned that "the Corps is faced with an either-or situation: it can either comply with North Dakota's water quality standards and potentially violate its statutory obligation under the FCA to maintain navigation, or it can operate as required under the FCA and potentially violate North Dakota's water quality standards." *Id.* at 17. "Although it is possible that the Corps may be able to simultaneously meet both its obligations," the court concluded, "the Court simply cannot require the Corps to always do both." *Ibid.* The court added that principles of preemption supported its conclusion, because "[r]equiring that the Corps always

comply with North Dakota's state water quality laws in its operation of the Missouri River impairs the Corps' ability to maintain navigation, and its ability to comply with the FCA." *Id.* at 19.

6. The court of appeals affirmed. Pet. App. 1-9. Like the district court, the court of appeals first noted that waivers of sovereign immunity must be strictly construed. *Id.* at 4. The court reasoned that, "[o]n its face, § 1371(a) exempts the Corps[] * * * from complying with the CWA when its authority to maintain navigation would be affected." *Id.* at 5. "It is also clear from the face of North Dakota's complaint," the court continued, "that North Dakota is attempting to use its state water-quality standards to affect the Corps' authority to release water from Lake Sakakawea to support navigation." *Ibid.* The court concluded that "[t]here are no exceptional circumstances here to indicate that Congress would not have intended the § 1371(a) 'navigation exception' to the waiver of sovereign immunity to apply in this case." *Ibid.*

The court of appeals then rejected petitioners' contention that the language or legislative history of the 1977 amendments to the CWA altered its analysis. Pet. App. 6. The court reasoned that the 1977 amendments, "while emphasizing that the limited waiver of sovereign immunity in § 1323(a) applied to the Corps, left the clearly worded navigation exception in § 1371(a) intact." *Ibid.* The court noted that, "[i]n any event," "[t]he legislative history indicates that Congress' intent in enacting the 1977 amendments was to subject the Corps' *channel-dredging* activities to state water-quality standards promulgated pursuant to the CWA, while preserving its authority to maintain navigation." *Id.* at 6 n.4. In light of its interpretation of Section 1323(a), the court did not

reach the issue whether Section 1323(a) was even applicable to releases of water from reservoirs. *Id.* at 5 n.3.

The court of appeals also rejected petitioners' contention that whether compliance with North Dakota's water quality standards would affect the Corps' authority to maintain navigation was a factual question. Pet. App. 7. The court reasoned that, "[i]f each state is allowed to use its reservoir water-quality standards as a tool to control how the Corps must release water from the main stem reservoirs, the 'authority of the Secretary of the Army . . . to maintain navigation' will obviously be affected." *Id.* at 8 (quoting 33 U.S.C. 1371(a)). Finally, the court of appeals, like the district court, noted that "the above result is also supported by the principles of preemption," *ibid.*, because "[a]llowing individual states to use their water-quality standards to control how the Corps balances water-use interests would frustrate the design of the FCA," *id.* at 9.

ARGUMENT

Petitioners contend (Pet. 16-30) that the court of appeals erred by holding that the Corps of Engineers is immune from enforcement of state-law water quality standards promulgated in accordance with the Clean Water Act for the release of water from a Corps-operated reservoir on the Missouri River Main Stem System. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. Petitioners do not contend that the decision below conflicts with any decision of another court of appeals. Instead, petitioners contend (Pet. 29) only that the holding of the court of appeals is "inconsistent with the man-

date of this Court" in *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology*, 511 U.S. 700 (1994). As petitioners correctly note (Pet. 29), in *PUD No. 1*, the Court rejected the proposition that the CWA "is only concerned with water 'quality,' and does not allow the regulation of water 'quantity.'" 511 U.S. at 719. The Court ultimately held that a State possessed the authority under Section 401 of the CWA, 33 U.S.C. 1341, to impose minimum stream flow requirements as a means of enforcing its water quality standards. 511 U.S. at 723. In *PUD No. 1*, however, the Court considered only the substantive scope of Section 401 of the CWA. It did not address any issue relating to the immunity of federal agencies under the CWA generally, much less the immunity of the Corps concerning discharges from Corps-operated reservoirs more specifically, and it likewise did not resolve any questions in that case concerning possible conflicts between state standards and federal licensing decisions. See *id.* at 722. Because *PUD No. 1* is inapposite, petitioners identify no conflict that warrants this Court's review.[4]

2. In any event, the court of appeals correctly held that the Corps is immune from enforcement of state-law water quality standards for the release of water from Lake Sakakawea. The CWA contains a general waiver

[4] For much the same reason, it is unnecessary for the Court to hold this petition pending its disposition of *S.D. Warren Co.* v. *Maine Department of Environmental Protection*, cert. granted, No. 04-1527 (Oct. 11, 2005). That case presents the question whether the release of water from a dam constitutes a "discharge" for purposes of the state certification requirement of Section 401(a)(1) of the CWA, 33 U.S.C. 1341(a)(1). Like *PUD No. 1*, *S.D. Warren Co.* concerns only the substantive scope of Section 401 of the CWA, not the application of state standards in other contexts or the immunity of a federal agency from enforcement of such standards.

of sovereign immunity, providing that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements[] * * * respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity," and it provides for enforcement of those requirements in court. 33 U.S.C. 1323(a). The CWA, however, also specifically provides that the statute "shall not be construed as * * * affecting or impairing the authority of the Secretary of the Army * * * to maintain navigation." 33 U.S.C. 1371(a). The most natural reading of those provisions is that Section 1371(a) provides an exception to the general waiver of sovereign immunity in Section 1323(a) where compliance with state-law water quality standards would interfere with the Corps' statutory obligation to maintain navigation. As both of the lower courts noted (Pet. App. 4, 14), that reading is consistent with the oft-cited principle that "a waiver of sovereign immunity must be strictly construed in favor of the sovereign." *Orff* v. *United States*, 125 S. Ct. 2606, 2610 (2005); see, *e.g.*, *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999); *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992).

In this case, although petitioners contended (see Pet. App. 7-8) that the Corps could have fulfilled its statutory obligation to maintain navigation through other means (*e.g.*, by constructing new outflow structures to ensure that only warmer water was released from Lake Sakakawea), and although petitioners note (Pet. 22) that their complaint "contains no reference to, and no request for, any relief relating to navigation," it is indisputable that the Corps acted primarily, if not exclusively, for the purpose of maintaining downstream navigation in ordering discharges from Lake Sakakawea.

See, *e.g.*, *Ubbelohde*, 330 F.3d at 1020-1022. Moreover, the court of appeals expressly rejected North Dakota's argument that the Corps could have fulfilled its statutory obligation to maintain navigation through other means on the ground that, "[i]f each state is allowed to use its reservoir water-quality standards as a tool to control how the Corps must release water from the main stem reservoirs, the 'authority of the Secretary of the Army . . . to maintain navigation' will obviously be affected." Pet. App. 8. Because the court of appeals correctly concluded that application of state water quality standards to prevent the Corps' discharges from Lake Sakakawea would necessarily "affect[]" or "impair[]" the Corps' authority to maintain navigation, the court of appeals also correctly concluded that state enforcement of those standards was barred.

Petitioners contend (Pet. 27-29) that the 1977 amendments to the CWA alter the analysis. Those amendments added language to Section 1323(a) specifying that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." Petitioners argue that the additional language constituted a plenary waiver of the Corps' immunity under the CWA—and, therefore, that the additional language effectively repealed Section 1371(a) in its entirety. Petitioners' argument, however, violates "the cardinal rule . . . that repeals by implication are not favored." *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (citation omitted). Petitioners fail to supply "the overwhelming evidence needed to establish repeal by implication." *J.E.M. AG Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001).

To the contrary, the legislative history indicates that Congress did *not* intend to repeal Section 1371(a) when it amended Section 1323(a) in 1977. As the court of appeals noted (Pet. App. 6 n.4), the legislative history of the 1977 amendments makes clear that Congress's intent was merely to subject the Corps to state water quality standards when it engages in the discharge of dredged or fill material—not to subject the Corps to state authority more generally (or specifically when it is releasing water from a reservoir to maintain navigation). Moreover, in adding a separate statutory provision expressly subjecting the discharge of dredged or fill material to state water quality standards, Congress included language specifying that "[t]his section shall not be construed as affecting or impairing the authority of the Secretary [of the Army] to maintain navigation." 33 U.S.C. 1344(t). Because that language tracks the language of Section 1371(a), the incongruous result of petitioners' construction would be that Congress provided the Corps with some immunity from enforcement when it engages in the discharge of dredged or fill material, at the same time that Congress entirely abrogated the Corps' immunity from enforcement when it engages in other types of activity. Because there is no indication that Congress intended that peculiar result, the text and background of the relevant provisions of the CWA confirm that Congress left Section 1371(a) intact when it enacted the 1977 amendments.

3. Finally, the question presented is not an important or recurring one that warrants this Court's review. Petitioners not only fail to establish even an arguable conflict between the court of appeals' decision and any decision of this Court or another court of appeals; they also fail to cite a single case in which a State has at-

tempted to enforce its water quality standards against the Corps in similar circumstances, much less any case in which the Corps has invoked Section 1371(a) in response. Moreover, the court of appeals made clear that, where an action against the Corps does not affect the Corps' authority to maintain navigation, the Corps would be subject to the general waiver of sovereign immunity in Section 1323(a). Pet. App. 6. Petitioners thus provide no reason to believe that the court of appeals' decision interpreting Section 1371(a) will have significant implications beyond the instant case.[4]

---

[4] In circumstances where the Corps or another federal agency is subject to the general provisions of Section 1323(a), a further question may arise in a given case as to whether a particular state water quality standard, including the designation of use for the particular water body, would be preempted by another federal statute or the responsibilities of an agency under such a statute. See, *e.g.*, *PUD No. 1*, 511 U.S. at 722. The court of appeals did not reach or decide any such question under Section 1323(a), however. To the extent that the court of appeals discussed preemption principles, it did so to reinforce its interpretation of Section 1371(a) as independently barring this suit. Although we agree with the court of appeals that enforcement of various States' standards could significantly interfere with the Corps' ability to manage water releases in the Main Stem System (and therefore to accomplish the purposes of the Flood Control Act), that discussion was not essential to the holding of this case. See, *e.g.*, Pet. App. 8 (noting that "the above result is also supported by the principles of preemption"). It is a long-established principle that this Court "reviews judgments, not opinions." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

JAMES C. KILBOURNE
ROBERT H. OAKLEY
Attorneys

FEBRUARY 2006

Supreme Court, U.S.
FILED
FEB 24 2006
OFFICE OF THE CLERK

No. 05-628

In The
Supreme Court of the United States

STATE OF NORTH DAKOTA,
THROUGH THE NORTH DAKOTA
DEPARTMENT OF HEALTH, et al.,

Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF OF THE STATE OF NORTH DAKOTA IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

State of North Dakota
WAYNE STENEHJEM
Attorney General

LYLE G. WITHAM
Assistant Attorney General
State Bar ID No. 04118
Counsel of Record
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

1. QUESTION PRESENTED 1

2. SUP. CT. R. 10(c) AND FEDERALISM 8

3. PUD NO. 1 9

TABLE OF AUTHORITIES

Page

CASES

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 8

Conley v. Gibson, 355 U.S. 41 (1957) 3

Conroy v. Aniskoff, 507 U.S. 511 (1993) 6

Gonzales v. Raich, 125 S.Ct. 2195 (2005) 9

K Mart Corp. v. Carier, Inc., 486 U.S. 281 (1988) 7

Minnesota v. Hoffman, 543 F.2d 1198 (8th Cir. 1976) 5, 6

Nat'l Wildlife Fed'n v. Corps of Engineers, 92 F. Supp. 2d 1072 (D.Or. 2000) 8

Nat'l Wildlife Fed'n v. Corps of Engineers, 132 F. Supp. 2d 876 (D.Or. 2001) 8

Nat'l Wildlife Fed'n v. Corps of Engineers, 384 F.3d 1163 (9th Cir. 2004) 8

Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982) 8

PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) 9

STATUTES AND RULES

N.D. Admin. Code § 33-16-02.1-02(2) 4

N.D. Admin. Code § 33-16-02.1-09(1)(f) 9

N.D. Admin. Code chapter 33-16-02.1 ..... 3, 10

N.D.C.C. § 61-28-01 4

CWA § 303, 33 U.S.C. § 1313 ..... *passim*

CWA § 303(c), 33 U.S.C. § 1313(c) 2, 7, 10

TABLE OF AUTHORITIES – Continued

Page

CWA § 313, 33 U.S.C. § 1323 ..... 5, 6, 7, 10

CWA § 313(a), 33 U.S.C. § 1323(a) 2, 5, 6

CWA § 401, 33 U.S.C. § 1341 10

CWA § 401(a)(6), 33 U.S.C. § 1341(a)(6) 10

CWA § 404, 33 U.S.C. § 1344 7

CWA § 404(t), 33 U.S.C. § 1344(t) 7

CWA § 511(a), 33 U.S.C. § 1371(a) 1, 2, 7

CWA § 511(a)(2)(A), 33 U.S.C. § 1371(a)(2)(A) 6

CWA § 511(a)(2)(B), 33 U.S.C. § 1371(a)(2)(B) 6, 7

Sec. 61(b) of Pub. L. No. 95-217, 95th Cong., 1st Sess. 10

Sec. 64 of Pub. L. No. 95-217, 95th Cong., 1st Sess. 10

Sup. Ct. R. 10(c) 8

OTHER AUTHORITIES

Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Knopf 2005) 9

1. Question presented. The federal respondents paraphrase North Dakota's statement of the question presented, but substitute the verb phrase "is immune" for the verb "exempts" used by the Eighth Circuit, and attempt to expand the "question presented" from the water quality standards (ND Pet. 2-4) that North Dakota promulgated under CWA § 303 (33 U.S.C. § 1313), to a more general question of the Corps' immunity from all "state-law water quality standards promulgated" under § 303 as applied to any "Corps-operated reservoir on the Missouri River." Respondent Nebraska objects to North Dakota's statement of the question presented as one that was not passed on below, suggesting that the issue North Dakota raises is "whether the Corps was universally 'exempt' from CWA compliance." (Neb. Op. Br. 1) They misconstrue the "question presented" for the reasons discussed below.

33 U.S.C. § 1371(a) (CWA § 511(a)) provides:

> This chapter [the CWA] shall not be construed as . . . (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899 . . . (ND App. 105)

The court below interprets this language as follows:

> On its face, § 1371(a) exempts the Corps, which operates under the authority of the Secretary of the Army, from complying with the CWA when its authority to maintain navigation would be affected. (ND App. 5)

But it is not obvious on its face that complying with North Dakota's § 303 water quality standards interferes with the Corps' "authority" to maintain navigation. It is possible to both maintain navigation and comply with state water quality standards, just as it is possible to drive a car and comply with the speed limit. A speed limit does not affect or impair a licensed driver's "authority" to drive: that authority can be exercised within the constraints of

the law. A state § 303 water quality standard, likewise, does not affect or impair the "authority" of the Secretary of the Army "to maintain navigation": that authority can be exercised within the constraints of the law. § 1371(a) neither "exempts" the Corps from North Dakota's water quality standards, nor do those standards affect or impair the "authority" of the Secretary "to maintain navigation": the Corps' "authority" to maintain navigation may be exercised within the context of North Dakota's § 303 standards as well as other "Federal, State, interstate and local" water pollution "requirements"[1] that may apply under § 1323(a) and other relevant federal laws such as the Flood Control Act (FCA) and the Endangered Species Act (ESA).

So North Dakota's petition accurately states the legal issue that arises out of § 1371(a), the court of appeal's interpretation of that text, and the standard of review: "Whether the court below erred in holding as a matter of law that the Clean Water Act exempts the Corps of Engineers from complying with water quality standards North Dakota is required to enact under § 303(c) of the Act?" (ND Pet. ii) Other aspects of the opinion below illustrate why this is the appropriate issue, and why the brief of the federal respondents (Fed. Op. Br. 10-13) misconstrues §§ 1371(a) and 1323(a).

After concluding that "the authority" of the Secretary of the Army "to maintain navigation" under § 1371(a) is a trump card that "exempts" the Corps' from complying with the CWA when the "authority" of the Corps "to maintain navigation . . . would be affected," the next sentence of the opinion states: "It is also clear from the face of North Dakota's complaint that North Dakota is attempting to use its state water-quality standards to affect the Corps'

[1] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. 101-103.

authority to release water from Lake Sakakawea to support navigation." (ND App. 5) The court below appears to make this claim to satisfy the standard of review that, as a matter of law, applies in this case: "we must accept the allegations of the complaint as true and dismiss the case only when 'it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief.'"[2] But North Dakota's Complaint does not mention navigation nor does it ask for any relief relating to navigation (ND App. 123-140, ND Pet. 13-14), and there are many sets of facts in support of North Dakota's claims that would entitle it to relief. (ND Pet. 9-16, 21-23) So it is not true that North Dakota's complaint affected the Corps' authority. Making "the authority" of the Corps "to maintain navigation" a trump card that "exempts" the Corps from complying with the CWA in effect changed the legal standard of review that the court below applied. Rather than accepting the allegations of North Dakota's complaint as true, and determining whether it appears "beyond doubt" that North Dakota can prove no set of facts in support of its claim, the court below made navigation trump North Dakota's § 303 standards under any hypothetical set of facts that impacts navigation.

The Court below, in fact, based its ruling on such a hypothetical: "If each state is allowed to use its reservoir water-quality standards as a tool to control how the Corps must release water from the main stem reservoirs, the 'authority of the Secretary of the Army . . . to maintain navigation' will obviously be affected, in violation of § 1371(a)." (ND App. at 8) North Dakota's § 303 standards (N.D. Admin. Code chapter 33-16-02.1), for example, are based on a "known and reasonable methods to control and

---

[2] ND App. 4, quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

prevent pollution" policy.[3] And in enforcing the State's declared policy "to protect, maintain, and improve the quality of the waters in the state,"[4] N.D.C.C. § 61-28-01 requires the health department "to cooperate with . . . agencies of other states, and the federal government in carrying out these objectives." Thus, the narrative standards that North Dakota asserts are not absolute standards that trump water quality standards in other states, nor do they trump the other federal statutes such as the FCA and the ESA that also apply to the Corps' management of the river. Rather these standards require, at most, a "greatest extent practicable" compliance level (ND App. 86) as applied by the state district court in this case, and even that compliance level is subject to the requirement that the enforcing agency "cooperate" with "agencies of other states, and the federal government" in carrying out the objectives of North Dakota's water pollution laws.[5]

North Dakota's water quality standards are just one among the many sets of federal, state, and local laws that the Corps must consider and comply with in its management of the main stem reservoirs on the Missouri River. They bring to bear the state's particular knowledge of the local water quality conditions as well as other local circumstances that bear upon managing the shared resource that is the Missouri River. They require application only of "known and reasonable methods"[6] to control water pollution, and these standards do not trump or override other water pollution laws up and down the river. North Dakota has never asserted that they do. Potential conflicts between laws is a policy consideration that Congress

---

[3] N.D. Admin. Code § 33-16-02.1-02(2).

[4] N.D.C.C. § 61-28-01.

[5] N.D.C.C. § 61-28-01.

[6] N.D. Admin. Code § 33-16-02.1-02(2).

addressed. It determined that federal facilities and properties should comply with "all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution."[7]

The opinion below rests upon an assertion that the waiver for federal facilities and property of federal immunity in § 313 (33 U.S.C. § 1323) was "limited." (ND App. 4) This waiver is "limited" only in the sense that it is limited to "Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution."[8] But the waiver itself was not a "limited" waiver by the plain language of its text: the word "all" was added to make clear that the waiver included "all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution."[9] (*Compare* 1976 version to current version – ND App. 100 to ND App. 101) And Congress added the following unequivocal waiver of immunity to § 313 in 1977 in response to *Minnesota v. Hoffman*, 543 F.2d 1198 (8th Cir. 1976) (in which Minnesota attempted to enforce its water quality standards against the Corps):

> This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.[10]

This case cries out for a textualist approach. The federal courts below discussed § 313 (§ 1323), but ignored the above-mentioned unequivocal waiver of immunity in the text. Instead, each referred to portions of the legislative

---

[7] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. 101.

[8] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. 101.

[9] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. 101.

[10] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. 101. *Compare* ND App. 100 to ND App. 101. *See also* ND App. 120.

history that discussed *Hoffman* and the Corps' dredge-and-fill activities in that case. (ND App. 4-5 & n.4, 15, and 30-35) The state district court looked at the same legislative history and drew a different conclusion. (ND App. 80)[11] But the actual words added to § 313 did not limit the waiver of federal immunity in § 313 to the Corps' dredge-and-fill responsibilities, or even mention them: rather the waiver unambiguously covered "all Federal, State, interstate, and local requirements . . . respecting the control and abatement of water pollution" and stated unequivocally that "[t]his subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law."[12]

Finally, the court below stated "[t]here is nothing ambiguous about the admonition" of § 1371(a)(2)(A) "that the CWA shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army . . . to maintain navigation." (ND App. 6, 105) By the same reasoning, there should be nothing ambiguous about the admonition of § 1371(a)(2)(B) that the CWA "shall not be construed as . . . affecting or impairing the authority of the Secretary of the Army . . . under the Act of March 3, 1899." The "Act of March 3, 1899" refers to the Corps' dredge-and-fill authority under the CWA. (ND Pet. 26, ND App. 105 and 107) Yet the court below says that the language of § 1371(a)(2)(A) "exempts" the Corps from the waiver of immunity in § 313 (§ 1323(a)) by leaving "the clearly

---

[11] The use of legislative history by all parties and the courts in this case illustrates the metaphor that using legislative history often becomes "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia concurring).

[12] CWA § 313(a), 33 U.S.C. § 1323(a), ND App. at 101. *Compare* ND App. 100 to ND App. 101. *See also* ND App. 120.

worded navigation exception in § 1371(a) intact" (ND App. 6), but holds that the reference in § 1371(a)(2)(B) to "the Corps channel dredging operations" (ND App. 6 and n.4) – which was also "left intact" – is no longer effective, based, apparently, on the legislative history cited in footnote 4.[13] This is inconsistent and untenable. (ND Pet. 25-27)

In sum, the question presented is one of statutory construction (ND Pet. 20) that requires the Court to look to the particular statutory language at issue – the provisions of §§ 303, 313, and 511 – in the context of the language and design of the Act as a whole.[14] The issue is not a general question of immunity for the Corps from all "state-law water quality standards promulgated" under § 303 as applied to any "Corps-operated reservoir on the Missouri River" as suggested by the Corps. (Fed. Op. Br. I) Nor is the issue "whether the Corps was universally 'exempt' from CWA compliance." (Neb. Op. Br. 1) Instead, for the reasons discussed above, North Dakota accurately describes the issue arising out of the decision of the court below: "Whether the court below erred in holding as a matter of law that the Clean Water Act exempts the Corps of Engineers from complying with water quality standards North Dakota is required to enact under § 303(c) of the Act?" (ND Pet. ii)

---

[13] The last sentence of the legislative history in n.4 of the opinion, ND App. 7, which the Court below apparently found conclusive, refers to the amendments to CWA § 404 (33 U.S.C. § 1344), not to the amendments to CWA § 313 (§ 1323) at issue here. *Compare* to the state district court's reference to the same legislative history reaching the opposite result. (ND App. 80) *See also* footnote 11, *supra*, in response to § 1344(t) comments at Fed. Op. Br. 13.

[14] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.").

2. Sup. Ct. R. 10(c) and federalism. The federal respondents suggest this case is not important (Fed. Op. Br. 10-13) and criticize our petition because it does not show a conflict between the circuits. (Fed. Op. Br. 9) But the Eighth Circuit and the North Dakota federal district court cited similar cases that those courts attempted to distinguish on the grounds that those cases didn't involve "navigation."[15] And this Court is currently considering closely related issues involving dam-caused pollution by non-federal dams (*see* SD et al. Amici Br. 18) and the scope of the Corps' authority over navigable waters (*see* SD et al. Amici Br. 4-5, n.7).

This case raises a related important question of federal law that has not been, but should be, settled by this court: the enforceability of § 303 state water quality standards against Corps controlled dams. (ND Pet. 16-25; SD et al. Amici Br. 1-20) The Clean Water Act is grounded in a cooperative federalism that "anticipates a partnership between the States and the Federal Government, animated by a shared objective" of protecting the nation's waters.[16] The role of the states is to prevent, reduce, and eliminate pollution under their inherent police powers. (ND Pet. 23-25) "By guaranteeing state and local governments broad decision-making authority, federalist principles secure decisions that rest on knowledge of local

---

[15] ND App. 5-6, n.3 (citing and discussing *Nat'l Wildlife Fed'n v. Corps of Engineers*, 384 F.3d 1163 (9th Cir. 2004)); ND App. 35-42 & nn.5-6 (citing and discussing *Nat'l Wildlife Fed'n v. Corps of Engineers*, 132 F. Supp. 2d 876 (D.Or. 2001); *Nat'l Wildlife Fed'n v. Corps of Engineers*, 92 F. Supp. 2d 1072 (D.Or. 2000); and *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 182-83 (D.C. Cir. 1982) (noting that state water quality standards would have been the better way to deal with the Corps-controlled "dam caused pollution" in that case, and noting that new dams cannot be built unless they comply with state water quality standards)).

[16] *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).